NOTES

COMBATTING RACISM: WOULD REPEALING TITLE VII BRING EQUALITY TO ALL?

*Karen L. Ross**

Table of Contents

I. Introduction

> "The battle for racial and economic justice is not yet won; indeed, it has barely begun."[1]

The law of federal employment discrimination is in a state of crisis. While anti-discrimination laws have been in effect for more than three decades, racial discrimination in employment has not ended.[2] Rather than addressing the problem of employment discrimination,

* B.A., Polical Science, Ithaca College (1993); J.D., Seton Hall University School of Law, anticipated May 1997. The author would like to thank Professor Michelle Adams for her invaluable assistance throughout the writing of this note.

[1] Derrick Bell, *Black History and America's Future*, 29 VAL. U. L. REV. 1179, 1190 (1995) (quoting Justice Marshall) [hereinafter *Black History and America's Future*].

[2] *See* Leroy C. Clark, *A Critique of Professor Derrick A. Bell's Thesis of the Permanence of Racism and his Strategy of Confrontation*, 73 DENV. U. L. REV.23, 37 (1995). *See also Black History and America's Future, supra* note 1, at 1182 (commenting that "[r]eversals in legal doctrine, combined with the devastating statistics of black poverty, unemployment, crime, and family and community destruction are destroying an ever growing number of black lives despite the committed efforts of civil rights lawyers").

some members of society have minimized and even ignored the effects of racial discrimination.[3] These individuals point to the successes of many African-Americans in the struggle for equality as proof that minorities can succeed in America if they work hard.[4] However, New York Times writer A.M. Rosenthal realizes that, regardless of how hard one works, the economy is hurting and jobs are disappearing at an all too rapid pace.[5] As a result of this economic crisis, the need to downsize companies has inevitably caused concern among employers.[6] Paralyzed by the thought of potential discrimination suits, employers are now more careful when determining the reasons for terminating or not hiring an applicant.[7] However, rather than justifying their practices as "racial preferences," employers are practicing more complex forms of racial discrimination by using "market pressures."[8]

As a result of the ineffectiveness of current federal legislation to curb this type of racial discrimination in employment, two scholars

---

[3] *See Black History and America's Future, supra* note 1, at 1180-81.

[4] *See Black History and America's Future, supra* note 1, at 1180-81 (discussing how the successes of Supreme Court Justice Thurgood Marshall and Dr. Martin Luther King, Jr.affect society's notion of equality). *But see* Clark, *supra* note 2, at 39 (stating that the majority of Americans "underwent attitude changes in the last thirty years, generally relinquishing crude or unadultered racial prejudice"). For comments on why there cannot be excellence without equality, see *Equality: Do the Concepts of our Legal System Hinder Efforts to Achieve a Meritocracy,* ABA JOURNAL, Nov. 1996, at 80-81.

[5] *See Black History and America's Future, supra* note 1, at 1183-84 (quoting A.M. Rosenthal, *On My Mind; Lean and Very Mean,* N.Y. TIMES, Dec. 16, 1994, at A39).

[6] *See Black History and America's Future, supra* note 1, at 1185. *See also* ROY L. BROOKS, ET AL., CIVIL RIGHTS LITIGATION CASES AND PERSPECTIVES 343 (1995) [hereinafter CIVIL RIGHTS LITIGATION].

[7] *See* CIVIL RIGHTS LITIGATION, *supra* note 6, at 343.

[8] *See* CIVIL RIGHTS LITIGATION, *supra* note 6, at 343. One example of a subtle and sophisticated form of discrimination was described as follows:

> [A] prejudiced hiring partner of an accounting firm publicly justifies his rejection of a minority candidate on the ground that the candidate does not fit the firm's corporate image, ignoring not only his own racial prejudice but also the minority candidate's superb grade point average.The hiring partner was bent on finding some legitimate ground on which to exclude the minority candidate.

Id. In this scenario, the discrimination is not driven by the partner's individual racial preference; it is the result of "market pressure." *Id.; see also* DERRICK E. BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 6 (1992) (discussing "racial schizophrenia" where, for example, hotels and restaurants offer black customers courteous and deferential treatment but uniformly reject black job applicants. Bell poses the question, "[w]hen did you last see a black waiter in a really good restaurant?") [hereinafter FACES AT THE BOTTOM OF THE WELL].

have advanced two completely distinct proposals with, ironically, the same goal: to repeal the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964.[9] Professor Richard Epstein, author of *Forbidden Grounds: The Case Against Employment Discrimination Laws* (*Forbidden Grounds*), believes that a free market will provide a more effective form of social justice than employment discrimination legislation.[10] Specifically, Epstein asserts that employers in a free market must not discriminate against individuals based on race, color or gender if they wish to succeed in today's competitive marketplace.[11] In sharp contrast, Professor Derrick Bell, author of *Faces at the Bottom of the Well: The Permanence of Racism* (*Faces at the Bottom of the Well*), proposes a new law to license discrimination.[12] Under Professor Bell's approach, employers who want to discriminate on the basis of race would be required to pay a fee that would be utilized to equalize benefits for African-Americans.[13]

This note will discuss the arguments of both those who support and those who oppose the repeal of Title VII of the Civil Rights Act of 1964.[14] Part II will provide a historical background of the social and legal environment surrounding employment discrimination laws.[15] Part III next discusses the legislative history of the 1964 Civil Rights Act.[16] Part IV will then address and critique Epstein and Bell's proposals to repeal the anti-discrimination provisions of Title VII.[17] In conclusion, this note will address how society should deal with those

---

9 *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992) (arguing that a competitive market will regulate discrimination better than any federal regulation) [hereinafter FORBIDDEN GROUNDS]; *see also infra* notes 66-83 and accompanying text; and FACES AT THE BOTTOM OF THE WELL, *supra* note 8 (proposing to repeal Title VII and replace it with a law which requires individuals to pay a fee to discriminate); *see also infra* notes 112-131 and accompanying text.

10 *See* FORBIDDEN GROUNDS, *supra* note 9, at 25.

11 *See* Clarence Page, *Market Government Against Discrimination*, ST. LOUIS POST-DISPATCH, Jan. 1, 1993, at 3C.

12 *See* FACES AT THE BOTTOM OF THE WELL, *supra* note 8, at 48.

13 *See* FACES AT THE BOTTOM OF THE WELL, *supra* note 8, at 48-49. In his article, Professor Page cited to the fact that the sponsors of the 1990 Fiesta Bowl did exactly the same thing by setting up a scholarship fund for blacks to entice a college to play in Arizona, even though the state failed to award a paid holiday to pay respect to the late civil rights leader, Martin Luther King, Jr. Page, *supra* note 11, at 3C.

14 *See infra* part IV.

15 *See infra* part II.

16 *See infra* part III.

17 *See infra* part IV.

individuals who wish to discriminate and justify their desires as "preferences" rather than racist notions of equality.[18]

II. An Historical Overview

A. *The Social Climate*

Employment discrimination has been prevalent throughout our nation's history. [19] During the era of slavery, African-Americans were denied both the right to contract for their labor and payment for their services.[20] Even after the abolition of slavery in 1865,[21] African-Americans were still denied the basic rights to national citizenship.[22] Black Codes were enacted by some Southern states to maintain the subordinate status of the newly freed slaves.[23] In response to this state action, Congress enacted the Civil Rights

---

18 *See infra* part V.

19 *See* CIVIL RIGHTS LITIGATION, *supra* note 6, at 343.

20 *See id.*

21 *See* U.S. CONST. amend. XIII. The Thirteenth Amendment, in relevant part, provides:

> Section 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

Id.

22 *See* LOUIS FISCHER, AMERICAN CONSTITUTIONAL LAW, VOLUME 2: CONSTITUTIONAL RIGHTS: CIVIL RIGHTS AND CIVIL LIBERTIES 948 (1990) [hereinafter AMERICAN CONSTITUTIONAL LAW].

23 *See id.* Southern states were committed to regulating every aspect of black life and trying to return blacks to the status of slaves. *Id.*; *see also* THEODORE EISENBERG, CIVIL RIGHTS LEGISLATION 3 (1981) (describing early civil rights efforts to end discrimination) [hereinafter CIVIL RIGHTS LEGISLATION]. With the exception of Arkansas and Tennessee, all southern states adopted Black Codes. CIVIL RIGHTS LEGISLATION, *supra* at 10 (citing M. KONVITZ, A CENTURY OF CIVIL RIGHTS 14 n.26 (1961). One of the harshest Black Codes existed in the state of Mississippi, which for example, prohibited blacks from:

> renting land anywhere but in incorporated towns or cities "in which places the corporate authorities shall control the same." Blacks with no lawful employment were deemed vagrants, subject to fine or imprisonment. Whites unlawfully assembling with blacks and white men "living in adultry or fornication" with black women were subject to harsher penalties than whites associating with other whites. Blacks convicted of crimes who failed to pay fines could be hired out to whites. Pre-abolition limitations on the capacity of blacks to testify were modified but continued. Blacks could not enter South Carolina to reside without posting a $1000 bond. Without a difficult-to-obtain license, blacks were prohibited from pursuing most trades other than husbandry or servant under a labor service contract.

Act of 1866 which guaranteed every citizen "the same right to make and enforce contracts . . . as is enjoyed by white persons."[24] The Civil Rights Act of 1866 was an extension of the Thirteenth Amendment and a preface to the Fourteenth.[25] In addition, the Fourteenth Amendment was adopted to guarantee equal protection under the law for all persons subject to the jurisdiction of the United States.[26] Likewise, Congress enacted the Fifteenth amendment to prohibit racial discrimination in voting. [27]

These civil war amendments secured national citizenship for African-Americans, but they did not effectively provide for full equality.[28] Segregated education inevitably resulted in and would

---

Different judicial procedures were established for blacks and black children between 18 and 21 years of age.

Id. (citing Act to Confer Civil Rights on Freedmen, 1865 Miss. Laws 82; Laws of South Carolina, 1865).

24 AMERICAN CONSTITUTIONAL LAW, *supra* note 22, at 948 (citing § 1 of the Civil Rights Act of 1866, 14 Stat. 27 (codified at 42 U.S.C. § 1982)).

25 *See* MARY FRANCIS BERRY, BLACK RESISTANCE: WHITE LAW 69 (1994) [hereinafter BLACK RESISTANCE: WHITE LAW]. The Act secured what the Civil War and the Thirteenth Amendment could not—the affirmative right to be a national citizen and to be protected by the federal government. *Id.* at 69-70; *see also Gressman, The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1325-28 (1952), *reprinted in* CIVIL RIGHTS LEGISLATION, *supra* note 23, at 21.

26 *See* U.S. CONST. amend. XIV. The Fourteenth Amendment provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. The Fourteenth Amendment constitutionalized the Civil Rights Act of 1866 and removed any doubt as to the federally secured right to national citizenship. *See* BLACK RESISTANCE: WHITE LAW, *supra* note 25, at 69.

27 *See* U.S. CONST. amend. XV. The Fifteenth Amendment provides:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Id. The Fifteenth Amendment was a national response to racially motivated violence by organizations such as the Ku Klux Klan. *See* BLACK RESISTANCE: WHITE LAW, *supra* note 25, at 79.

28 *See* CIVIL RIGHTS LEGISLATION, *supra* note 23, at 7. "The comprehensive coverage of federal civil rights laws did not eliminate the inferior status of blacks in American society." *Id.* As a result of this deficiency, advocates for rights pressured constituents via affirmative action programs. *Id.* These programs, however, divided communities

play a strong role in employment opportunities for African-Americans.[29] Equality was denied first in education under the "separate but equal" doctrine. [30] Under this rationale, the states were able to effectively segregate schools by providing similar, but not necessarily equal, facilities.[31] Thereafter, state resistance of desegregation in education spilled over into other areas including housing and job discrimination.[32] Not surprisingly, this resistance has denied African-Americans entry to high-level positions and to equal pay in employment.[33]

---

and, unlike anti-discrimination legislation, appeared to offer blacks opportunities at the expense of innocent individuals. *Id.* While affirmative action has historically survived constitutional attacks, the Fifth Circuit Court of Appeals' decision in *Hopwood v. Texas* and the United States Supreme Court's ruling in *Adarand Constructors, Inc. v. Pena* indicate that the remedial purposes of affirmative action will be harshly scrutinized in future programs. *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) and Adarand Constructors, Inc. v. Pena, ___ U.S. ___, 115 S. Ct. 2097 (1995).

29 *See* AMERICAN CONSTITUTIONAL LAW, *supra* note 22, at 963.

30 *See* Plessy v. Ferguson, 163 U.S. 537, 544 (1890) (upholding separate but equal accommodations on railroad cars); Cumming v. Board of Educ., 175 U.S. 528 (1899) (upholding separate but equal education); Berea College v. Kentucky, 211 U.S. 45 (1908) (permitting the outlaw of integrated education in private colleges); Gong Lum v. Rice, 275 U.S. 78 (1927) (holding that states have the discretion to force Chinese children to attend public schools with African-Americans). These cases were effectively overruled by *Brown v. Board of Educ.*, 347 U.S. 483 (1954), which held that separate but equal education was unconstitutional.

The struggle for equal treatment in education, however, did not end after the *Brown* decision. President Eisenhower refused to endorse the *Brown* decision. *See* AMERICAN CONSTITUTIONAL LAW, *supra* note 22, at 953. In addition, the Supreme Court did not announce its guidelines for eliminating segregation until the second *Brown* decision in 1955. *See* Brown v. Board of Educ., 349 U.S. 294 (1955) (requiring desegregation in "all deliberate speed"). Unfortunately, the opinion was without teeth and desegregation progressed at a very slow pace. *See* AMERICAN CONSTITUTIONAL LAW, *supra* note 22, at 953.

31 *Plessy*, 163 U.S. at 550-51. The court stated:

> we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

Id.

32 *See* AMERICAN CONSTITUTIONAL LAW, *supra* note 22, at 969. In fact, "little was accomplished toward desegregation until Congress and the President in the Civil Rights Act of 1964 confronted the injustices of racism." *Id.*

33 *See* CIVIL RIGHTS LITIGATION, *supra* note 6, at 343. "Overt racism in America peaked in the early twentieth century, a fact reflected in the federal government's attitude toward blacks." CIVIL RIGHTS LEGISLATION, *supra* note 23, at 4.

B. *The Legal Issues*

While employment discrimination can be attacked as a violation of one's constitutional rights, it is typically challenged under statutory entitlements. [34] The first federal legislation since Reconstruction[35] to effectively prohibit racial discrimination in employment was Title VII of the Civil Rights Act of 1964.[36] Although successful in some aspects, the passage of the Civil Rights Act of 1964 did not solve the problem of employment discrimination.[37] As a result, the executive, judicial and legislative branches have struggled with and often disagreed with one another on how to solve the problem of employment discrimination based on race.[38]

---

[34] *See* CIVIL RIGHTS LITIGATION, *supra* note 6, at 344.

[35] Reconstruction was the period after the Civil War where the seceded states obtained normal relations with the union. *See* Webster's New World Dictionary 1122 (3d ed. 1986). After Reconstruction, discriminatory practices in employment, education, housing, public accommodations, the judicial system, and voting rights were left mostly unchallenged until President Franklin D. Roosevelt issued an executive order which forbade employment discrimination by a company working under a government defense contract. *See* Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941).

[36] *See* CIVIL RIGHTS LITIGATION, *supra* note 6, at 345. *See also* Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1994)). Section 703(a) of Title VII prohibits employment discrimination on the basis of race, color, sex, religion, and national origin with respect to the "compensation, terms, conditions, or privileges of employment." *See* Pub. L. No. 88-352, § 703(a). It further prohibits employers from limiting, segregating, or classifying employees so as to adversely affect them because of their race, color, religion, sex or national origin. *Id.* Section 703(h) provides, in pertinent part:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

See Pub. L. No. 88-352 (codified as 42 U.S.C. § 2000e-2(h) (1994)).

The first federal employment discrimination law was enacted by President Roosevelt, not by Congress. *See* CIVIL RIGHTS LITIGATION, *supra* note 6, at 344. *See* Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941) (prohibiting federal agencies and contractors from discriminating in vocational and other job training programs on the basis of race, creed, color, or national origin). The Equal Pay Act of 1963 was the first federal statute prohibiting employment discrimination. *Id.* The Act mandated equal pay to both sexes where the jobs in question "involve equal skill, effort, and responsibility, and are performed under similar working conditions." *Id.* (describing 29 U.S.C. § 206(d)). See generally, Joan E. Rigdon, *Three Decades After the Equal Pay Act, Women's Wages Remain Far From Parity*, WALL ST. J., June 9, 1993, at B1, as to the Act's effectiveness.

[37] *See* Clark, *supra* note 2, at 37.

[38] *See infra* notes 39-43 and accompanying text.

The Reagan and Bush administration possessed an almost overtly hostile attitude towards any advancement in civil rights, more apparently when it came to appointments to the judiciary.[39] Compared to President Carter's administration, which tripled the number of African-American federal judges from 12 to 38,[40] Presidents Reagan and Bush appointed very few minorities or women to the bench.[41] Similarly, the Supreme Court has also been criticized for its lack of support for civil rights legislation.[42] Specifically, the Supreme Court has been criticized for its judicial decisions weakening the scope and effectiveness of federal civil rights legislation.[43]

Despite executive and judicial hostility toward civil rights legislation, Congress passed significant legislation advancing civil rights, including the Civil Rights Act of 1991.[44] Most notably, the

---

39 *See* Clark, *supra* note 2, at 37-38 (referring to NORMAN C. AMAKER, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION (1988)). The only presidents to oppose the enactment of the Civil Rights Act of 1964 were Reagan and Bush. *Id.* at 38 (referring to Doug Freelander, *The Senate-Bush: The Polls Give Him Excellent Chance*, HOUS. POST, Oct. 11, 1964, at S12; David S. Broder, *Reagan Attacks the Great Society*, N.Y. TIMES, June 17, 1966, at 41). Likewise, they are the only presidents to veto civil rights legislation in the twentieth century. *Id.* President Bush vetoed the 1990 bill because he felt it would impose unfair quotas on employers. *Id.* (referring to Carl Cannon, et al., *House Passes Civil Rights Bill; But Veto Likely, Senate Favors Law by Slim Margin*, DET. FREE PRESS, June 6, 1991, at 1A).

40 *See* Clark, *supra* note 2, at 37 n.87 (citing JACK GREENBURG, CRUSADES IN THE COURTS 472 (1994)). The appointees to the federal bench by Presidents Reagan and Bush were frequently "unsympathetic" to the arguments made by civil rights advocates. *Id.*

41 *See* Clark, *supra* note 2, at 37 (citing JACK GREENBURG, CRUSADES IN THE COURTS 380 (1994)).

42 *See* Clark, *supra* note 2, at 38-39.

43 *See* Clark, *supra* note 2, at 38-39 (referring to Professor Derrick Bell's characterization that the Court "setback" the cause of civil rights by their numerous decisions limiting the scope and effectiveness of civil rights legislation). *See, e.g.*, Martin v. Wilks, 490 U.S. 755 (1989) (discussing consent decrees and allowing affirmative action plans to be challenged more easily after the fact); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (analyzing the disparate impact theory and making it more difficult for plaintiffs to prevail); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (dismissing minority set asides); Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (detailing the relationship of § 1981 of the 1866 Civil Rights Act to the 1964 Act and narrowing the coverage of the civil rights statute); Price-Waterhouse v. Hopkins, 490 U.S. 228 (1989) (making it more difficult for a plaintiff to prevail when an employer's motivation was a mixture of legitimate and discriminatory reasons); EEOC v. Arabian Am. Oil Co., ___ U.S. ___, 111 S. Ct. 1227 (1991) (limiting the coverage of Title VII in foreign employment); West Virginia Univ. Hosp. Inc. v. Casey, ___ U.S. ___, 111 S. Ct. 1138 (1991) (limiting fees for expert witnesses for prevailing parties).

44 *See* Clark, *supra* note 2, at 38. For example: the Voting Rights Act of 1982 was

Act unprecedently provides for remedial damages in cases of intentional discrimination in employment.[45]

---

amended and improved; Congress overrode the Presidential Veto of President Reagan to pass the Civil Rights Restoration Act of 1986; the Fair Housing Act was amended and substantially improved in 1988; and a bill barring discrimination in employment and public accommodations of the disabled was passed in 1990. *Id.; see also* The Voting Rights Act of 1982, 42 U.S.C. §§ 1971-74 (1988); Civil Rights Restoration Act of 1987, 20 U.S.C. §§ 706, 794; 42 U.S.C. §§ 6107, 2000d-4(a) (Supp. 1990); Senate Comm. on Labor and Human Resources, Civil Rights Restoration Act of 1987, S. Rep. No. 64, 100th Cong., 1st Sess. 1-2 (1987), *reprinted in* 1988 U.S.C.C.A.N. 3, 3-4; The Fair Housing Act, 42 U.S.C. §§ 3601-3616 (1988 & Supp. V 1993); Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (1988 & Supp. V 1993).

[45] 42 U.S.C. § 1981 (1994). Section 1981 states, in relevant part:

> (b) Compensatory and Punitive Damages —
>
> (1) Determination of punitive damages. A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.
>
> (2) Exclusions from compensatory damages. Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.
>
> (3) Limitations. The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party —
>
> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $ 50,000;
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $ 100,000;
>
> (C) in the case of a respondent who has more than 200 but fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and
>
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current of preceding calendar year, $ 300,000.00.
>
> (4) Construction. Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1977 of the Revised Statutes (42 U.S.C. § 1981).

42 U.S.C. § 1981.

III. Legislative History of the Civil Rights Act of 1964

Legislators began their fight to provide citizens with a federal remedy for employment discrimination as early as 1943 when Congressman Vito Marcantonio (ALP, N.Y.) introduced a bill to give employment discrimination law statutory status. [46] Numerous bills involving employment discrimination were proposed between 1943 and 1964.[47] Only one bill, however, was passed by either house, and two bills were defeated by Senate filibusters.[48] The only legislation dealing with fair employment practices was introduced by Congressman Samuel K. McConnell, Jr. (R., PA) and was passed by the House on February 23, 1950.[49] The bill, however, was strenuously objected to and heavily debated when it was introduced in the Senate.[50] Consequently, the "extended debate" in the Senate caused the bill to die on the Senate floor. [51]

It was not until June 19, 1963, that the first civil rights legisla-

---

[46] *See* BNA OPERATIONS MANUAL ON FAIR EMPLOYMENT PRACTICES, PUBLIC ACCOMMODATIONS AND FEDERAL ASSISTANCE, THE CIVIL RIGHTS ACT OF 1964: TEXT, ANALYSIS, AND LEGISLATIVE HISTORY 17 (1964) [hereinafter BNA OPERATIONS MANUAL]. In December of 1943, Congressman Robert Ramspeck (D-Ga.) introduced a bill seeking to abolish the Federal Employment Practice Committee. *Id.* at 17-18. Neither Congressmen Marcantonio nor Ramspeck's bill were enacted. *Id.* at 18.

[47] *See id.* at 17-18 (referencing Dawson-Scanlon House Bill of 1954 and several other bills between 1943-1964 to resolve racial discrimination).

[48] *See id.* Committee approval came easier in the Senate than in the House. *Id.* Bringing the proposed legislation to a floor vote, however, was more cumbersome in the Senate. *Id.*

[49] *See id.* The McConnell bill substituted a bill introduced by Congressman Adam C. Powell (D-N.Y.) which provided for "enforcement of orders based on findings of illegal discrimination." *Id.* The McConnell bill would have established a Fair Employment Practices Commission to study matters of discrimination on the basis of race, creed, color, sex, physical disability, and political affiliation and to render a recommendation for its elimination. *Id.* On February 23, 1950, the House voted to substitute Powell's bill with McConnell's bill. *Id.* The vote to substitute passed by 221 to 178. *Id.* The substitute bill subsequently passed in the House 240 to 177. *Id.*

[50] *See id.* at 18-19. Opponents of the bill made several arguments. *Id.* First, they asserted that the bill would substitute the jury's judgment with that of a single individual. *Id.* Second, they argued that a single hearing officer would act as both an *ex parte* judge and jury. *Id.* Third, they contended that review by the court would be limited to only administrative findings of fact. *Id.*

[51] *See* BNA OPERATIONS MANUAL, *supra* note 46, at 19. The Senate refused to vote on the bill by a 55 to 33 margin. *Id.* This was the second incident of the Senate's use of its notorious filibuster. *Id.* The first incident occurred in 1946 when Senator Chavez (D-N.M.) introduced a bill which reached the senate floor but failed to obtain a vote. *Id.*

tion was proposed.[52] Introduced by President John F. Kennedy, House Resolution 405 provided for enforcement through suits in federal court and received tentative approval from the House Labor Committee.[53] Meanwhile, Senate Bill 1937 was introduced by Senator Hubert Humphrey (D-Minn.).[54] The bill would have allowed an administrator, appointed by the Department of Labor, to enforce equal employment opportunities. [55] The disagreement between the House and the Senate on these issues would have normally ensured a virtual burial of any proposed bill.[56] The dispute, however, was resolved by establishing a bipartisan Equal Employment Opportunity Commission (EEOC). The EEOC has no enforcement power; rather, enforcement power remained with the federal district courts.[57] Exactly one year later, on June 19, 1964, the Senate passed a compromised bill which the House later passed on July 2, 1964.[58] The following day, President Lyndon B.

---

52 *See* BNA OPERATIONS MANUAL, *supra* note 46, at 20. During the 87th Congress, President Kennedy did not propose any federal employment practice legislation. *Id.*

53 *See* BNA OPERATIONS MANUAL, *supra* note 46, at 20. The administration, however, did not approve of the enforcement provision, and when the Committee tried to set procedures similar to the National Labor Relations Board, the Senate "vigorously" objected. *Id.* A later bill (H.R. 7152), which was produced by the House Judiciary Committee Chairman Emanuel Celler (D-N.Y.) and William McCulloch (R-Ohio), had bipartisan support and was then ready for consideration. *Id.* at 21.

54 *See* BNA OPERATIONS MANUAL, *supra* note 46, at 21.

55 *See* BNA OPERATIONS MANUAL, *supra* note 46, at 21. The bill would also have required the administrator "to prosecute complaints before an independent Equal Opportunity Board [which was] to issue cease and desist orders enforceable in the federal courts of appeals." *Id.* The bill was approved by Committee. *Id.*

56 *See* BNA OPERATIONS MANUAL, *supra* note 46, at 21.

57 *See* BNA OPERATIONS MANUAL, *supra* note 46, at 21. See also 110 CONG. REC. 13745, 13693-95 (1964), for a detailed summary of the debates concerning the enforcement of Title VII.

58 *See* BNA OPERATIONS MANUAL, *supra* note 46, at 20. The Senate bill passed after 83 days of "bitter debate." *Id.* at 1. The House passed H.R. 7152 after only an hour of debate by a vote of 289 to 126. *Id.* at 22. The purpose of Title VII of the Civil Rights Act of 1964 was to prohibit employers from discriminating on five major bases: race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a), (c) (1994). All five bases of discrimination, however, were not present throughout the legislative process. *See* BNA OPERATIONS MANUAL, *supra* note 46, at 31. The original bill sent by the subcommittee to the House Judiciary Committee proscribed discrimination on the basis of "race, color, religion, national origin, or ancestry." *Id.* The bill sent to the House by the full Judiciary Committee, however, did not include the word "ancestry." *Id.* (referring to H.R. REP. NO. 914, 88th Cong., 1st Sess. 87 (1963)). An amendment was proposed during the House debates to add "age" to the classes of discrimination but this attempt failed. *Id.* at 31-32 (referring to 110 CONG. REC. 2503 (1964)). An amendment was introduced by Congressman Smith (D-Va.) to prevent discrimination

Johnson signed the Civil Rights Act of 1964 into law.[59]

---

on the basis of sex. *Id.* at 32 (referring to 110 CONG. REC. 2484 (1964)). Although the amendment was opposed by Congressman Celler (D-N.Y.), see 110 CONG. REC. 2485 (1964), the amendment was adopted by a vote of 168 to 133. *See* BNA OPERATIONS MANUAL, *supra* note 46, at 32 (referring to 110 CONG. REC. 2492 (1964)).

In addition, the legislation created an Equal Employment Opportunity Commission which was clothed with various powers including assisting regional, state, and local agencies in effectuating employment discrimination laws and intervening in a civil action brought under section 2000e-5 of Title VII. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-4(g) (1994). Section 2000e-5 provides the enforcement provisions of the act and clothes the Commission with the power to prevent unlawful employment practices. 42 U.S.C. § 2000e-5 (1994).

59 *See* BNA OPERATIONS MANUAL, *supra* note 46, at 20. "After more than 20 years an FEP [Federal Employment Practice] bill, under another name, became law with President Johnson's signature." *Id.* at 22. It has been advanced that the death of President Kennedy and the emotional reaction by the country enabled Johnson to push the civil rights legislation through Congress. *See* ROWLAND EVANS AND ROBERT NOVAK, LYNDON B. JOHNSON: THE EXERCISE OF POWER 379 (1968). As soon as Johnson was sworn into the Presidency, he immediately began advocating for Kennedy's Civil Rights bill. *Id.* at 376. "Anybody who thought on November 22, 1963 that he might be tempted to scuttle the Civil Rights bill simply had not been listening to Lyndon Johnson the past three years." *Id.*

More than the death of President Kennedy and President Johnson's skilled congressional politics played a role in the enactment of the Civil Rights Act. *Id.* at 363. Socially, the Civil Rights movement was gaining more momentum and notoriety. *Id.* There was extreme civil unrest in the South evidenced by a number of riots, including the Birmingham Riots in May 1963, sit-ins, demostrations, picketing and boycotts which had prompted President Kennedy to quickly push for the enactment of the Civil Rights legislation. AMERICAN CONSTITUTIONAL LAW, *supra* note 22, at 954.

Legislatively, because of the lack of a committee report or hearing record in the Senate and the absence of a Senate-House conference report, searching for the legislative intent of the Civil Rights Act is "more difficult than usual." BNA OPERATIONS MANUAL, *supra* note 46, at 323. For legislative intent, therefore, see the following significant senate and house debates: 110 CONG. REC. 6987-88 (1964) (Constitutionality); 110 CONG. REC. 6986 (1964) (Justice Department Reply on Title VII); 110 CONG. REC. 6992-94 (1964) (Clark-Case Memorandum); 110 CONG. REC. 6995-97 (1964) (Clark Response to Dirksen Questions); 110 CONG. REC. 13246 (1964) (Ability Tests); 110 CONG. REC. 2485 (1964), 110 CONG. REC. 13168 (1964) (Sex Discrimination); 110 CONG. REC. 2456 (1964) (National Origin Discrimination); 110 CONG. REC. 13745-46 (1964) (Security Clearance Exception); 110 CONG. REC. 13745, 110 CONG. REC. 13693-95 (1964) (Enforcement of Title VII); 110 CONG. REC. 13776 (1964) (Pattern of Discrimination); 110 CONG. REC. 6987 (1964) (State FEP Laws); and 110 CONG. REC. 1879 (1964), 110 CONG. REC. 13219 (1964) (Public Accommodations). *See also* H.R. REP. NO. 914, 88th Cong., 1st Sess. (1963); 110 CONG.REC. 12381-5 (1964) (Dirksen's explanation of substituted amendment number 656); 110 CONG. REC. 12286-89, 12295-99 (1964) (Humphrey's explanation of Title II, VI, and VII); 110 CONG. REC. 15453-58 (1964) (comparative analysis of Senate and House bills); 110 CONG. REC. 15363-65 (1964) (statement by House Manager on Senate substitutions).

IV. Proposals to Repeal Title VII of the Civil Rights Act of 1964

In contrast to those who believe in the necessity of employment discrimination laws, two scholars have recently advanced the theory that the anti-discrimination provisions of the Civil Rights Act are not effective means of eliminating discrimination. [60] Similarly, both scholars call for the repeal of Title VII's anti-discrimination provisions. [61] The scholars diverge, however, on what kind of

---

60 *See infra* part IV. A., IV. B. Federal Affirmative Action programs have also recently come under attack by a number of states and certain members of Congress in Washington. At the state level, opponents of affirmative action had hoped to place measures on the ballot to end preferential treatment in employment in the following states: Colorado, Florida, Oregon, Massachusetts, Michigan and Washington. Only the state of California was able to obtain enough votes to place an anti-affirmative action measure on the ballot, California Proposal 209. *See Society for Human Resource Management*, H.R. MAGAZINE, Sept. 1996, at 192, 192. *See also* Ellis Case, *After Affirmative Action: Proposition 209 May Become Law, but Californians are in No Rush to End All Racial Preferences*, NEWSWEEK, Nov. 11, 1996, at 43. This measure passed by an overwhelming majority, over sixty percent of those voting supported the proposition. *See* Robert Pear, *The 1996 Elections: The Nation—The States; In California, Voters Bar Preferences Based on Race*, N.Y. TIMES, Nov. 6, 1996, at B7. The measure requires that state affirmative action programs be dismantled, although judicial challenges to this are expected. *Id.*

At the federal level, then Senator Robert Dole (R-Kan.) co-sponsored a bill (S. 1085) entitled "The Equal Opportunity Act of 1995" which would have eliminated affirmative action programs based on race as well as gender. *See* S. 1085, 104th Cong., 1st Sess. (1995). Specifically, the bill placed a prohibition, not only against discrimination, but more significantly against preferential treatment. Section 2 of the bill entitled "Prohibition Against Discrimination and Preferential Treatment" states the following:

> Notwithstanding any other provision of law, neither the Federal Government nor any officer, employee, or department or agency of the Federal Government—
>
> (1) may intentionally discriminate against, *or may grant a preference to*, any individual or group *based in whole or in part* on race, color, national origin, or sex . . .
>
> (2) may require *or encourage* any Federal contractor or subcontractor to intentionally discriminate against, *or grant a preference to*, any individual or group *based in whole or in part* on race, color, national origin, or sex; or
>
> (3) may enter into a consent decrees that requires, *authorizes, or permits* any activity prohibited by paragraph (1) or (2).

S. 1085, 104th Cong., 1st Sess. (1995) [emphasis added]. Although the bill's alleged purpose was to prohibit governmental discrimination, the effect of the proposed bill would have been to eliminate three decades of federal civil rights enforcement achieved through the Civil Rights Act of 1964. *See* Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965).

61 *See infra* part IV. A., IV. B.

system should replace the current federal system.[62] Professor Richard Epstein proposes a laissez-faire type approach wherein the market would regulate discrimination.[63] In contrast, Professor Derrick Bell suggests that a Racial Preference Licensing Act should replace the federal legislation.[64] The next two subparts will discuss each proposal in turn. [65]

A. *Richard A. Epstein's Free Market Analysis*

Richard Epstein contends that competitive markets can protect individuals from discrimination better than any anti-discrimination law. [66] He asserts that the anti-discrimination system does not create any additional advantages that would exceed its social or economic costs.[67] Consistent with this theory, Professor Epstein argues two premises: first, that federal anti-discrimination laws pertaining to private employers should be repealed,[68] and second, that affirmative action initiated by the government rather than by private employers is more problematic because the government cannot reasonably and equitably distribute jobs among its citizens.[69]

---

62 *See infra* part IV. A., IV. B.

63 *See infra* part IV. A.

64 *See infra* part IV. B.

65 *See infra* part IV. A., VI. B.

66 *See* FORBIDDEN GROUNDS, *supra* note 9, at 9, 25. Epstein argues that the present consensus about the discrimination principle as applied to labor markets "focuses too heavily on historical injustices, for which there is no adequate remedy, and too little on the economic and social consequences that are generated by the anti-discrimination laws, especially as they have been shaped and extended within the American political system. The future and present are being slighted in favor of the past." *Id.* at 2. Epstein, however, does not assert that competitive markets will eliminate discrimination; he concedes that some discrimination will still exist. *Id.* at 76-78; *see also* Richard A. Epstein, *Point, The Subtle Vices of the Employment Discrimination Laws,* 29 J. MARSHALL L. REV. 575 (1996) [hereinafter *Subtle Vices*]; Ian Ayres, *Forbidden Grounds: The Case Against Employment Discrimination Laws,* 207 THE NEW REPUBLIC 30 (1992) (book review) (stating that "[a]s an economist, Epstein believes that competition radically disables bigotry from hurting black people"). Although Epstein admits that some forms of discrimination will exist even if competitive markets are the regulator, he contends that invidious forms of discrimination would cease to exist. *See* Richard A. Epstein, *Standing Firm, on Forbidden Grounds,* 31 SAN DIEGO L. REV. 1, 2 (1994) [hereinafter *Standing Firm*].

67 *See* FORBIDDEN GROUNDS, *supra* note 9, at 27.

68 *See* FORBIDDEN GROUNDS, *supra* note 9, at 9. Professor Epstein qualified his first premise by stating that laws which "operate in ordinary competitive markets without legal protections against the entry of new rivals." *Id.*

69 *See* FORBIDDEN GROUNDS, *supra* note 9, at 9. Professor Epstein has no problem with private affirmative action. *See Subtle Vices, supra* note 66, at 585. In fact, he en-

In *Forbidden Grounds*, Professor Epstein asserts that those who "prefer" to work with certain groups should be entitled to have their preferences enforced in a court of law, even if such preferences result in racial discrimination.[70] Professor Epstein advances what he believes is not racism, but rather "rational" discrimination in a competitive market setting.[71] He uses a two part analysis to justify his view that some discrimination can be characterized as "rational."[72] First, Professor Epstein argues that the more diverse a company employee's "tastes" are, the harder it is for the employer to satisfy each and every preference.[73] As a result, Professor Epstein believes that society should learn an important lesson: that they do not have to care about a firm's discriminatory practices.[74]

---

dorses it. *Id.* What he opposes is the government deciding which affirmative action program shall be endorsed and which shall not. *Id.*

70 *See Subtle Vices, supra* note 66, at 580. In addition, Professor Epstein has referred to anti-discrimination laws as the "antithesis of freedom of contract"—"a principle that allows all persons to do business with whomever they please for good reason, bad reason, or no reason at all." FORBIDDEN GROUNDS, *supra* note 9, at 3. *See also* Ayres, *supra* note 66, at 30 (stating that Professor Epstein refers to "the taste for discrimination" as "just another preference").

71 *See Subtle Vices, supra* note 66, at 579 (referring to chapter three in FORBIDDEN GROUNDS, *supra* note 9, at 59-78). Professor Epstein declared in Forbidden Grounds that "[t]here are forms of discrimination that outsiders may find offensive, but which are rational nonetheless." FORBIDDEN GROUNDS, *supra* note 9, at 76. According to Michael J. Leech, Professor Epstein "underestimates the power of racism." Michael J. Leech, *Counter-Point, Legalizing Employment Discrimination: A Foolish and Dangerous Policy*, 29 J. MARSHALL L. REV 587, 615. Leech argues that Professor Epstein's reliance solely upon what he believes to be "ineffective" employment discrimination laws is not enough. *Id.* at 615-16. Instead, Leech asserts that one must look to the successes of civil rights leaders throughout the past. *Id.* at 616. For example, those leaders who rejected "the moral abomination of Black slavery despite the many thousands of lives it cost," the various presidents and congressional members who have proposed civil rights legislation advancing equality, and the peaceful revolution for equality and justice led by Dr. Martin Luther King, Jr. *Id.* (citing *Matthew* 12:25; *Mark* 3:25; *Luke* 11:17; *Amos* 5:24). Leech argues that citizens should have more than a moral duty towards one another; they should also have a legal duty. *Id.* at 615-16. Further, Leech contends that laws prohibiting employment discrimination should remain on the books until Title VII suits "are a curiosity from a bygone era." Leech, *supra* at 616.

72 *Subtle Vices, supra* note 64, at 579-80. Professor Epstein does not argue that many forms of discrimination cannot survive in competitive markets but that rational discrimination should be expected in private markets. *See* FORBIDDEN GROUNDS, *supra* note 9, at 76.

73 *Subtle Vices, supra* note 66, at 580. *See also* FORBIDDEN GROUNDS, *supra* note 9, at 61, 66-67 (asserting that anti-discrimination laws conflict with the "smooth operation" of companies if those companies have employees with differing views because it becomes more difficult to make a collective decision which pleases everyone).

74 *See Subtle Vices, supra* note 66, at 580. Professor Epstein states that individual

Instead, society should "[l]et the chips fall where they may, firm by firm."[75] Second, Professor Epstein claims that discrimination is rational in competitive markets because not every breach of contract provides a legal remedy to the affected party.[76] Instead, when people have non-employment ties with one another,[77] they will substitute informal sanctions for legal sanctions.[78] Professor Epstein concludes, therefore, that not all discrimination is harmful and, in fact, discrimination in competitive markets can be rational.[79]

The success of Professor Epstein's recurring thesis—that competitive markets will drive out discrimination better than government regulation[80]—is dependent upon three basic necessities.[81] Those requirements are: (1) the repeal of anti-discrimination laws preventing discrimination in employment, (2) opening markets to allow entry into employment as quickly as possible, and (3) the removal of any impediments[82] standing in the way of employers and employees' ability to mutually assent to employment terms.[83]

Critics of Professor Epstein's thesis, however, argue that he focuses too heavily on these abstractions[84] and not enough, if at all, on social realities.[85] Numerous scholars have criticized Professor

---

firms can sort through their own disparity in preferences without the interference of government regulation. *Id.*

75 *Subtle Vices, supra* note 66, at 580.

76 *See Subtle Vices, supra* note 66, at 580.

77 *See Subtle Vices, supra* note 66, at 581. For example, Professor Epstein points out that the Korean and Israeli communities rely on informal sanctions when they conduct business. *Id.*

78 *See Subtle Vices, supra* note 66, at 581. Professor Epstein apparently justifies the practices of Koreans and other like groups, which only do business with similar groups, by claiming that because they have more ties, this minimizes the probability of a contractual breach. *See id.* Therefore, it is perfectly rational to discriminate against other groups in their employment practices. *Id.*

79 *See Subtle Vices, supra* note 66, at 581.

80 *See, e.g., Subtle Vices, supra* note 66; *Standing Firm, supra* note 66; FORBIDDEN GROUNDS, *supra* note 9.

81 *See Standing Firm, supra* note 66, at 2.

82 *See Standing Firm, supra* note 66, at 2. Professor Epstein listed the impediments as follows: unemployment taxation, the minimum wage, anti-discrimination law, and most health and safety regulations. *Id.*

83 *See Standing Firm, supra* note 66, at 2.

84 *See* Richard A. Epstein and Erwin Chemerinsky, *Forum: Should Title VII of the Civil Rights Act of 1964 be Repealed?*, 2 S. CAL. INTERDISCIPLINARY L.J. 349, 356-57 (1993). Among the abstractions are his freedom of contract and market theories. *Id.* (debating whether the Civil Rights Act of 1964 should be repealed).

85 *See id.* (arguing that laws prohibiting employment discrimination are essential). Professor Chemerinsky notes that some of the most prevalent social realities are ra-

Epstein for not recognizing the social harms, such as racism and sexism, of employment discrimination.[86] In addition, critics maintain that Professor Epstein's proposal to repeal the anti-discrimination laws implies that if society ignores the problem, it will disappear.[87]

Among these criticisms, there are at least three economic costs imposed by employment discrimination.[88] The first is the cost incurred by the employee who is discriminated against because of

---

cism, sexism, anti-Semitism and homophobia. *Id.* at 357. For example, the realities of African-Americans in today's society is worth relaying. For those who have trouble understanding racism, imagine as Professor Leech so emotionally portrayed, life as an African-American:

> The stereotype of blacks as "dishonest" means that whenever money or property is missing, suspicion immediately falls on you. It means you are consistently asked for identification when trying to cash a check or followed around a store by a detective when shopping. Your success is not a personal triumph. Instead, you are congratulated as "a credit to your race." Taxicabs will not stop to pick you up. Instead of explaining to your children that the word "nigger" is a cruel word that should not be used, you must console your child when she has been the target of this racial epithet. These indignities, and many others, constantly remind blacks that they are defined first by their race and only second as human beings.

Leech, *supra* note 71, at 594.

86 *See* Chemerinsky, *supra* note 84, at 358. In Professor Chemerinsky's closing statement, he adamantly portrays his position on Professor Epstein's book, FORBIDDEN GROUNDS:

> Frankly, I found Professor Epstein's book outrageous because I think it fails to account for how evil racism, sexism and anti-Semitism are in this society, and how essential it is that the government now and always be against them. Employment discrimination laws must remain on the books. I think Professor Epstein is simply wrong in urging their repeal.

Id. at 366; *see also* Leech, *supra* note 71, at 587 (commenting that anti-discrimination laws are the "embodiment of the American ideal of human equality"); Samuel Issacharoff, *Contractual Liberties in Discriminatory Markets*, 70 TEX. L. REV. 1219 (1992) (reviewing FORBIDDEN GROUNDS, *supra* note 9).

Similarly, in his most recent publication, *Reply, Regulatory Sins Versus Market Legacies: A Short Reply to Mr. Leech,* Professor Epstein sought to appeal to those who may file a civil rights suit, he wrote:

> There are no free lunches, even here. Every time an individual brings a civil rights suit, remember that there is some nameless black person or nameless woman out there whose chances of getting employment have been reduced by your action. The law of unanticipated social consequences holds for even society's most cherished social programs.

Richard A. Epstein, *Reply, Regulatory Sins Versus Market Legacies: A Short Reply to Mr. Leech*, 29 J. MARSHALL L. REV. 616, 622 (1996).

87 *See* Leech, *supra* note 71, at 587.

88 *See* Chemerinsky, *supra* note 84, at 359.

race, religion, or gender.[89] For example, loss of income and loss of dignity are costs incurred by victims of employment discrimination.[90] The second cost is the harm to society's principle of equality.[91] The principal of equality, demanding that everyone should be treated alike, is destroyed by a market system which allows discrimination, whether private or public.[92] Lastly, society must pay an enormous price for legalizing discrimination because no one can measure the potential of collective individuals if they are not given a chance to succeed regardless of race, religion, or gender.[93]

Erwin Chemerinsky, Legion Lex Professor of Law at University of Southern California Law Center, has previously noted five flaws in Professor Epstein's analysis.[94] First, Professor Chemerinsky notes that Professor Epstein ignored history which has proved that an unregulated market does not curb employment discrimination any better than federal regulation.[95] In fact, even after African-Americans finally achieved the freedom to contract, discrimination continued through poverty, unequal education, and inferior socio-economic standing.[96] Second, Professor Chemerinsky argues that market analysis cannot account for the prejudice inherent in an

---

89 *See* Chemerinsky, *supra* note 84, at 359.

90 *See* Chemerinsky, *supra* note 84, at 359. Professor Chemerinsky indicated that an individual who is discriminated in the hiring practice or on the job generally loses income. *Id.* In addition, a certain amount of dignity is lost to an individual who faces discrimination, no matter how determined the individual is. *Id.; see also* John J. Donohue, III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1597-1603 (1992) (reviewing FORBIDDEN GROUNDS, *supra* note 9) (discussing social costs of discrimination).

91 *See* Chemerinsky, *supra* note 84, at 359. *See generally* Donohue, *supra* note 90, at 1597-1603 (discussing social costs of discrimination).

92 *See* Chemerinsky, *supra* note 84, at 359.

93 *See* Chemerinsky, *supra* note 84, at 359. *See also* Donohue, *supra* note 90, at 1597-1603.

94 *See* Chemerinsky, *supra* note 84, at 357-58.

95 *See* Chemerinsky, *supra* note 84, at 357. Professor Chemerinsky claims that an unregulated market system was in effect prior to the passage of the 1964 Civil Rights Act. *Id.* In support of this proposition, he points to the fact that when Sandra Day O'Connor graduated from the top of her class at Stanford Law School, the only legal job she could obtain was as a legal secretary. *Id.* Professor Chemerinsky questioned: "[w]here was the market system to provide her with a job?" *Id.* Based on these arguments, Professor Chemerinsky concludes that "employment discrimination is pervasive in a free market system." *Id.*

96 *See* Issacharoff, *supra* note 86, at 1232 (stating that "freedom to contract did little to protect blacks in the postwar South from the continued subrogation brought about by poverty, lack of education, and woefully inferior socioeconomic standing").

employer's evaluation of its employees.[97] He asserts that if an employer has a "preference" for certain individuals, then no market system will protect a disadvantaged employee from being undervalued.[98] Third, Professor Chemerinsky maintains that Professor Epstein has been criticized for accounting only for employer preferences and failing to recognize customer preferences.[99] Fourth, Professor Chemerinsky argues that Professor Epstein's theory that a competitive market will generate enough jobs for individuals affected by an employer's discriminatory preferences is highly speculative.[100] As a result, Professor Chemerinsky concludes that there is no guarantee that such jobs will be created.[101]

The fifth, and most morally charged criticism, is that Professor Epstein completely ignores that some employers prefer discrimination at any cost.[102] Shifting for a moment away from race, Professor Chemerinsky asserts that the most obvious example involves sexual discrimination in the work place.[103] For example, an estimated fifty percent of women have been sexually harassed in the workplace.[104] Despite the cost of this harassment to employers, sexual harassment is still prevalent.[105] So why does sexual harassment continue? According to Professor Chemerinsky, because employers feel that their "short-term gains" outweigh the cost imposed upon them through litigation.[106] As a result, employers discrimi-

---

97 *See* Chemerinsky, *supra* note 84, at 357.

98 *See* Chemerinsky, *supra* note 84, at 357. Professor Chemerinsky argues that "when prejudice is pervasive throughout society the market system repeatedly undervalues contributions of these individuals and as a result these people never get hired as they should." *Id.*

99 *See* Chemerinsky, *supra* note 84, at 357. "A law firm believes that its clients don't want to deal with Jewish lawyers. An employer believes that its customers don't want to deal with those with disabilities. And as a result, throughout the market you see individuals who are minorities or disabled or Jewish not getting hired." *Id.* at 357-58.

100 *See* Chemerinsky, *supra* note 84, at 358. Professor Chemerinsky argues that even if groups such as African-Americans and Jews can create jobs within their own communities, it still does not account for the systematic exclusion of these individuals from prevalent white communities. *Id.*

101 *See* Chemerinsky, *supra* note 84, at 358.

102 *See* Chemerinsky, *supra* note 84, at 358.

103 *See* Chemerinsky, *supra* note 84, at 358 (referring to Theodore F. Claypoole, *Comment, Inadequacies in Civil Rights Laws: The Need for Sexual Harassment Legislation*, 48 OHIO ST. L.J. 1151, 1159 (1987)).

104 *See* Chemerinsky, *supra* note 84, at 358 (referring to Claypoole, supra note 103, at 1159).

105 *See* Chemerinsky, *supra* note 84, at 358.

106 *See* Chemerinsky, *supra* note 84, at 358. Professor Chemerinsky questions: "Why

nate regardless of the cost to them.[107] Therefore, Professor Chemerinsky concludes that the competitive market system which Epstein advocates actually produces discrimination.[108]

Professor Epstein acknowledged that the majority of the country favors anti-discrimination laws.[109] However, critics argue that Professor Epstein failed to acknowledge that the majority's view is based on the premise that racism should be practiced neither openly nor publicly.[110] As a result, Professor Epstein's proposal to repeal the anti-discrimination provisions of the Civil Rights Act can do significant harm: it may lend legitimacy to those individuals who wish to unleash their hidden or unconscious racism.[111]

B. *Derrick E. Bell's Racial Preference Licensing Act*

Unlike Professor Epstein, Professor Derrick Bell recognizes the social realities that African-Americans face. In *Faces at the Bottom of the Well,* [112] Professor Bell argues that racism is an "integral, permanent, and indestructible component" of our society.[113] In eight short stories, Professor Bell highlights a broad range of racial themes.[114] Among those themes, he introduces his controversial

---

do employers do this knowing that they might lose valuable female employees who might quit as a result?" *Id.* He answers: "their short-term perceived benefits are greater than their long-term costs." *Id.* Professor Chemerinsky continues, "[r]egardless, they believe that the short term gains are worth the cost to them, and, thus, they go ahead and discriminate." *Id.*

107 *See* Chemerinsky, *supra* note 84, at 358.

108 *See* Chemerinsky, *supra* note 84, at 358.

109 *See Subtle Vices, supra* note 66, at 577, 584. *See also* Leech, *supra* note 71, at 615; Donohue, *supra* note 90, at 1583-84.

110 *See* Leech, *supra* note 71, at 615 (commenting that today's majority view—that racism should not be practiced openly or publicly—is a "remarkable change in public attitude in only a generation or two").

111 *See* Leech, *supra* note 71, at 615.

112 *See* FACES AT THE BOTTOM OF THE WELL, *supra* note 8.

113 *See* FACES AT THE BOTTOM OF THE WELL, *supra* note 8, at ix.

114 *See* FACES AT THE BOTTOM OF THE WELL, *supra* note 8, at 1-14.Among Professor Bell's "racial themes" are the following: contemporary problems of race relations, the status of civil rights, and aspects of the condition of African-Americans. *See* Tracy E.Higgins, *Derrick Bell's Radical Realism,* 61 FORDHAM L. REV. 683, 683 (1992) (reviewing DERRICK E. BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992)). "The themes are wide-ranging, but through the telling of stories situated within a continuing dialog between Geneva and a law professor narrator (a narrator who, most readers will assume, represents Bell himself), Professor Bell weaves the themes together to achieve a powerful commentary on the possibility of racial justice and the importance of struggle in the face of overwhelming odds." *Id.* at 683-84.

"Racial Preference Licensing Act" (Act) to replace the Civil Rights Act of 1964. [115] The Act would require all employers, owners and managers of hotels, restaurants and other facilities to obtain a license from the government to discriminate against African-Americans by excluding them from such public places.[116] The license would be expensive.[117] A three percent tax would be imposed on the employers deriving income from all white employees, customers, or products sold to whites during each quarter the racial preference is maintained.[118] Under the hypothetical Act, license holders would be required to prominently display their licenses in a public place and conduct their business according to the "racially selective policies" put forth in their licenses.[119] The fees paid by license holders would be deposited into a fund designed to help African-American businesses, to provide no-interest mortgage loans for African-American home buyers, and to grant scholarship funds to African-American college and vocational students.[120]

In a scholarly dialogue between a fictional civil rights attorney, Geneva Crenshaw, and a law professor narrator (presumably Bell himself), Professor Bell visualized application of the Act.[121] For example, in one essay, "The Racial Preference Licensing Act," Geneva points to the advantages of such a punitive law.[122] First, the

---

115 *See* FACES AT THE BOTTOM OF THE WELL, *supra* note 8, at 47-64.

116 *See* FACES AT THE BOTTOM OF THE WELL, *supra* note 8, at 47-48. Professor Bell declares that three decades after its enactment, the Civil Rights Act, especially in the employment area, has been "undermined by both unenthusiastic enforcement and judicial decisions construing its provisions even more narrowly." *Id.* at 49. Although Professor Bell does not urge the Racial Preference Licensing Act, he has commented that "a law permitting open segregation, with some special provisions to benefit blacks, might lessen the amount of discrimination." Sharon Griffen, *Racism is Here to Stay, Professor Says*, THE SAN DIEGO UNION-TRIBUNE, Oct. 16, 1992, at E-1.

117 *See* FACES AT THE BOTTOM OF THE WELL, *supra* note 8, at 48.

118 *See* FACES AT THE BOTTOM OF THE WELL, *supra* note 8, at 48. Although the Act has been artfully posed by Professor Bell as a fictional Act passed by a fictional Congress, he is careful to note that the Congressional power derives from the commerce clause, the taxing power, and the general welfare clause of the Constitution. *Id.*

119 *See* FACES AT THE BOTTOM OF THE WELL, *supra* note 8, at 48. Detailing the specific duties of license holders, the Act provides that selective discrimination is not allowed and license holders cannot "hire or rent to one token black and then discriminate against other applicants, using the license as a shield against discrimination suits." *Id.* Further, the Act provides successful plaintiffs with damages in the amount of $10,000 plus attorney's fees *per instance* of unlicensed discrimination. *Id.*

120 *See* FACES AT THE BOTTOM OF THE WELL, *supra* note 8, at 48-49.

121 *See* Higgins, *supra* note 114, at 683.

122 *See* FACES AT THE BOTTOM OF THE WELL, *supra* note 8, at 61-62.

dialogue discusses how the Act would quiet concerns, like those of Professor Epstein, that an anti-discrimination law denies citizens the right to free association by exposing discriminators and punishing those who did not obtain a license by imposing an enormous fine.[123] Second, the dialogue explaines that the financial and psychological "benefits" of racism may diminish as whites would have to pay a high financial price to African-Americans for their discriminating "preference" not to associate with them.[124] Lastly, the dialogue concludes that African-Americans will no longer have to guess as to whether a potential employer wants to exclude them because ample notice of such discrimination is secured by the Act's requirement that signs be publicly posted.[125]

The purpose of the Racial Preference Licensing Act is to create a brighter future for all citizens.[126] Specifically, Professor Bell argues that "racial realism" is the key to black equality.[127] Racial realism encourages African-Americans to take a long, hard look at American history and white mentality in order to pursue equality.[128] Racial realism does not assume racial tolerance which does not exist. [129] Rather, Professor Bell asserts that it declares racial justice in the marketplace by balancing the rights of African-Ameri-

---

123 *See* FACES AT THE BOTTOM OF THE WELL, *supra* note 8, at 61 (citing Herbert Wechler, *Toward Neutral Principals*, 73 HARV. L. REV. 1, 34 (1973) (suggesting that *Brown v. Board of Education* [347 U.S. 483 (1954)] may be criticized as requiring "integration [that] forces an association upon those for whom it is unpleasant or repugnant")).

124 *See* FACES AT THE BOTTOM OF THE WELL, *supra* note 8, at 61. Geneva proudly declares:

> Today even the worst racist denies being a racist. Most whites pay a tremendous price for their reflexive and often unconscious racism, but few are ready to post their racial preferences on a public license and even less ready to make direct payment for the privilege of practicing discrimination. Paradoxically, gaining the right to practice openly what people now enthusiastically practice covertly, will take a lot of the joy out of discrimination and replace that joy with some costly pain.

Id. at 61-62.

125 *See* FACES AT THE BOTTOM OF THE WELL, *supra* note 8, at 62.

126 *See* FACES AT THE BOTTOM OF THE WELL, *supra* note 8, at 47.

127 *See* FACES AT THE BOTTOM OF THE WELL, *supra* note 8, at 47.

128 *See* Stephanie Goodman, *Recent Publication*, 28 HARV. C.R.-C.L. L. REV. 244, 245 (1993) (reviewing FACES AT THE BOTTOM OF THE WELL, *supra* note 8). "Bell urges African-Americans to make an honest assessment of American history and the white mentality that enslaved an estimated fifty million African youths and young adults, and attempted to annihilate an entire race of Native-Americans in order to steal their land." *Id.* (citing FACES AT THE BOTTOM OF THE WELL, *supra* note 8, at 11).

129 *See* FACES AT THE BOTTOM OF THE WELL, *supra* note 8, at 47.

cans to fair treatment with the needs of whites to "prefer" certain customers, employees and contractees.[130] By forcing those who "prefer" to discriminate to obtain a license and pay significant fees, whites' preferences would be satisfied while, more importantly, African-Americans would be provided with the resources to obtain better status and to associate with allies rather than enemies.[131]

Those who criticize Professor Bell's book generally attack his legal storytelling writing style[132] and his lack of definitive answers to his illustrative examples of racism.[133] In addition, many attack his work for its complete lack of recognition of the role of whites in the struggle for civil rights.[134] Critics argue that Professor Bell's

---

130 *See* FACES AT THE BOTTOM OF THE WELL, *supra* note 8, at 47. Through an example of a fictional President of the United States, Professor Bell makes the following comment on the previous actions advanced on behalf of African-Americans:

> It is time, to bring hard-headed realism rather than well-intentional idealism to bear on our longstanding racial problems. Policies adopted because they seemed right have usually failed. Actions taken to promote justice for blacks have brought injustice to whites without appreciable improving the status or standards of living for blacks, particularly for those who most need the protection those actions were intended to provide.

Id. at 49.

131 *See* FACES AT THE BOTTOM OF THE WELL, *supra* note 8, at 49. The Act declares that the fees paid will maximize "freedom of racial choice for all our citizens while guaranteeing that people of color will benefit either directly from equal access or indirectly from the fruits of the license taxes paid by those who choose policies of racial exclusion." *Id.* at 52. In addition, Professor Bell suggests that African-Americans need "to push for more money and more effective plans for curriculum in all-black schools rather than exhaust ourselves and our resources on ethereal integration in mainly white schools." *Id.* at 63.

132 See generally, Margaret M. Russell, *A New Scholarly Song: Race, Storytelling, and the Law*, 33 SANTA CLARA L. REV. 1057, 1059 (1993) (reviewing FACES AT THE BOTTOM OF THE WELL, *supra* note 8), for a discussion on legal storytelling. Under particular race theories, legal storytelling is defined as "a method of conveying perspectives on race relations which historically have been excluded from legal discourse and scholarship." *Id.*

133 *See, e.g.*, Clark, *supra* note 2, at 49; Goodman, *supra* note 128, at 247, 250 (claiming that Bell "stops short of providing concrete, useful solutions"); Cheryl I. Harris, *Bell's Blues*, 60 U. CHI. L. REV. 783, 786 (1992) (reviewing FACES AT THE BOTTOM OF THE WELL, *supra* note 8) (stating that Professor Bell's book does not offer answers); Higgins, *supra* note 114, at 683 (suggesting that Professor Bell's legal storytelling style allows him "to avoid confronting the contradictions within his analysis").

134 *See* Goodman, *supra* note 128, at 248.

> Bell suggests that the enemy is white America, which, due to the advantages of using blacks as scapegoats, persists in its racism and subordinates blacks to inferior social and economic status. However, Bell neglects to address the responsibility that blacks themselves have in the struggle for equality in American society.

overall thesis—that racism is an integral, permanent and indestructible component of our society—is pessimistic[135] and ignores the advances made by African-Americans over the past few decades.[136]

In particular, one scholar has criticized Professor Bell for claiming to be a "racial realist" when in reality he is only a "dedicated idealist" who places all his faith in the law and legal institutions. [137] In fact, critics point out that Professor Bell has admitted to believing that racial discrimination would diminish when it was declared unconstitutional by the Supreme Court.[138] One commentator has suggested that this belief has lead some to refer to the Supreme Court as the most powerful branch of goverment. Consequently, those individuals pay attention to the political beliefs of each nominee to the Supreme Court, and they fight to keep those

---

Id.; see also Clark, *supra* note 2, at 29 (noting to the fact that the NAACP and the Urban League originated with whites and blacks working cooperatively).

135 *See* Russell, *supra* note 132, at 1063. Margaret M. Russell, Assistant Professor of Law at Santa Clara University School of Law, believes, however, that although Professor Bell has a dim outlook on the struggle for civil rights, he is determined to never give up. *Id.* Ultimately, Bell's superficially pessimistic premise . . . is tempered by his spiritual and political commitment never to concede the fight for social justice. He concludes that the true story of Black History is 'a story less of success than of survival through an unremitting struggle that leaves no room for giving up.' " *Id.* (quoting FACES AT THE BOTTOM OF THE WELL, *supra* note 8, at 200); *see also* Haywood Burns, *Faces at the Bottom of the Well: The Permanence of Racism*, 255 THE NATION 605 (Nov. 16, 1992) (book review).

136 *See* Goodman, *supra* note 128, at 250. *See also* Clark, *supra* note 2, at 36-37. For example, African-Americans had $9 billion more real income per year in 1984 (adjusted for inflation) than they would have if the Civil Rights Act of 1964 was never enacted. *Id.* at 36 (citing Alfred E. Blumrosen, *The Law Transmission System and the Southern Jurisprudence of Employment Discrimination*, 6 INDUS. REL.. L.J. 313, 338 (1984)). In addition, there were only a few African-American elected officials in 1940; by 1988 there were 6,800. *Id.* at 36 (citing A COMMON DESTINY—BLACKS AND AMERICAN SOCIETY (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989)) [hereinafter A COMMON DESTINY]. A COMMON DESTINY was a report of twenty-two committee members who researched the status of African-Americans.Further, since Governor Wallace's term in the early sixties, no white elected official has openly endorsed racial segregation. *Id.*

137 Clark, *supra* note 2, at 40. "In this belief, Professor Bell exhibits a characteristically American attitude, namely that law and legal institutions can fix any problem, no matter how complex, immediately and simply." *Id.* (citing STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS 3-22 (1994)).

138 *See* Clark, *supra* note 2, at 40 (citing Derrick Bell, *Legal Storytelling—The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH.L. REV. 2382, 2394 (1989) (stating that "[m]ost of us thought that the 1954 Supreme Court decision in *Brown v. Board of Education* would close the book on racial discrimination and open a new era of opportunity that knew no color line").

nominees with adverse political beliefs off the bench.[139]

Ironically, Professor Epstein has commented that any quota or taxation system on discrimination would probably not succeed.[140] Professor Epstein contends that the public disapproval over the ability to monetize discrimination would be unbearable.[141] He points out that imposing a tax to discharge the obligation only softens the objections.[142] In fact, Professor Epstein agrees with the opposition claiming that until it is proven that a government regulated market outperforms a competitive market, then no regulation—even in the form of a tax—should be imposed.[143]

Nonetheless, Professor Bell has been commended for his challenge to traditional racial assumptions of the historical civil rights movements[144] and praised for his realization that "justice for all" will not bring African-Americans to full equality when whites control both power and economic status.[145] Scholars assert that Pro-

---

139 *See* Clark, *supra* note 2, at 40 (citing STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS 3-22 (1994)).

140 *See Standing Firm, supra* note 66, at 55-56 (referring to a variety of scholars work including: DERRICK E. BELL, *Racial Preference Licensing Act*, in FACES AT THE BOTTOM OF THE WELL, *supra* note 8, at 47 (1992); David Strauss, *The Law and Economics of Racial Discrimination in America: The Case for Numerical Standards*, 79 GEO. L.J. 1619 (1991) (proposing a system similar to Professor Bell's; and Robert Cooter, *Market Affirmative Action*, 31 SAN DIEGO L. REV. 133 (1994)). Professor Epstein stated: "the difficulties with [the tax system] are so great that it will die of its own weight." *Id.* at 56.

141 *See Standing Firm, supra* note 66, at 56. In addition to addressing Professor Bell's taxation system, Professor Epstein also addresses other scholars proposals to set quotas. *Id.* Professor Epstein argues that it would be impossible to impose the same standards for quotas on every company, regardless of the occupation. *Id.* Professor Epstein claims that a high-tech computer company may find it harder to fill a quota than a construction firm. *Id.* Likewise, he asserts that the difference in geographical locations would make it extremely difficult to impose a uniform system of quotas. *Id.* Also, Professor Epstein notes the bitter opposition to quota systems in the current environment. *See Standing Firm, supra* note 66, at 56.

142 *See Standing Firm, supra* note 66, at 56.

143 *See Standing Firm, supra* note 66, at 56. Professor Epstein then quotes a famous expression by President Kennedy: "A rising tide raises all boats. That is open competition. But the correlative proposition is that a falling tide leaves many boats grounded. That is the modern civil rights laws." *Id.*

144 *See* Lynne Duke, *Beyond Struggle for Civil Rights*, THE WASHINGTON POST, April 23, 1992, at X1; *see also* Higgins, *supra* note 114, at 692 (recognizing that FACES AT THE BOTTOM OF THE WELL offers a powerful argument in favor of rethinking traditional strategies in the struggle against racism").

145 *See* Goodman, *supra* note 128, at 250 (stating that Professor Bell "is not blinded by the false-positive notion that equality and justice for all will bring African-Americans to an equal level of participation in a society where whites control the power and economic status").

fessor Bell encourages African-Americans to reassess their past in order to sensibly plan for a future with equality.[146] In this respect, Professor Bell proposes the Racial Preference Licensing Act. According to Professor Bell, African-Americans would be no worse off, and the Act may even prove to be advantageous to African-Americans if it severely taxed those who discriminate.[147] As a result, if society chooses to continue discriminating, then at least such a law would establish an equity fund designated for minority use.[148]

V. Conclusion

How one views employment discrimination laws depends on one's priorities.[149] For Professor Epstein, the freedoms of contract and association are more important than the realities of the lives of African-Americans and the principal of equality.[150] For Professor Bell, charging a fee to those who discriminate is a proposal designed to both soften the effects of the permanence of racism in our society and to provide African-Americans with a better opportunity for success.[151] However, Professor Epstein and Professor Bell's proposals are virtually identical in their application. Both would place a financial burden on the employer. Professor Epstein's proposal restricts the number of employees and clients available to the employer while Professor Bell's Racial Preference Licensing Act burdens the employer with a fine. Although both Professors call for the repeal of the anti-discrimination provisions of Title VII, their objectives and legal reasoning could not be far-

146 *See* Goodman, *supra* note 128, at 251. "Bell wants blacks to wake up and realize they should not have to work harder than whites to achieve the same rights and privileges. Equality means starting at the same place with the same resources. The reality is that a harsher standard exists for most blacks." *Id.* at 250-251.

147 *See* Stephanie B. Goldberg, *Who's Afraid of Derrick Bell?: A Conversation on Harvard, Storytelling and the Meaning of Color*, 78 SEPT. A.B.A. J. 56 (1992).

148 *See* Patricia Holt, *Racism and Reality: The first step to dealing with the racism is to realize that it's not going away*, THE SAN FRANCISCO CHRONICLE, Sept. 13, 1992, at 1.

149 Interestingly, Epstein's belief is based primarily on what opinion polls show most whites believe - "that racism is an aberration, a flaw of individuals that is rapidly diminishing." Page, *supra* note 11, at 3C.In sharp contrast, Bell's position is consistent with polls in which African-American's associate - "that racism is a systematic flaw, permanently imbedded in society and infecting attitudes of individuals who think they know better." *Id.*

150 *See* Chemerinsky, *supra* note 84, at 360.

151 *See* FACES AT THE BOTTOM OF THE WELL, *supra* note 8.

ther apart. Distinctly, Professor Epstein sees a world where equality takes the back seat to individual "preferences" while Professor Bell sees every citizen as holding the beliefs of Professor Epstein - that individuals should not care about a firm's discriminatory practices, i.e., just let the chips fall where they may.[152] Consequently, Professor Bell believes that full equality for African-Americans can never be achieved.

For others, the principal of equality most likely overrides any desire to repeal anti-discrimination laws. The harsh reality is that although our society has progressed since the enactment of the various civil rights acts, and there is a general acceptance of others regardless of race, gender, religion, or nationality, America is not a perfect melting pot. Bigotry and racism still exist. The question is: how will society deal with such individuals? Do we condone the behavior that most of us now consider immoral by enhancing and enforcing civil rights legislation? Or do we give up on a nation which is divided along many racial, religious and class lines by repealing the anti-discrimination laws? If we repeal them, do we replace them with a Racial Preference Licensing Act, as suggested by Professor Bell? Or do we, as Professor Epstein promotes, allow the market to regulate private discrimination?

The dangers of legalizing employment discrimination are clear: legalization will increase both social unrest and racial divisiveness,[153] and it will reduce job opportunities for minorities.[154] In light of the social harms created by employment discrimination, laws prohibiting such discrimination should remain on the books.[155] It would be devastating for our society to repeal the anti-discrimination provisions of Title VII. Although our current system of government regulation of employment discrimination may not be perfect, it still symbolizes a nation which has endured a civil war, protests, and many riots to bring equality to all. The various Civil Rights Acts may well be the most important pieces of legislation ever enacted by Congress. Any proposal which undermines the principal of equality should not be accepted.

Employers should have both a moral and a legal duty not to discriminate in the hiring or firing of employees. Replacing anti-

152 *See supra* part IV. A.
153 *See* Leech, *supra* note 71, at 587.
154 *See* Chemerinsky, *supra* note 84, at 358.
155 *See* Chemerinsky, *supra* note 84, at 366.

discrimination laws with Professor Epstein's market regulation would only lend legitimacy to the practice of racism, whether overt or unconscious. Although Professor Bell's Act would allow freedom of association while placing a burdensome fine on those who wish to discriminate, it is unlikely that this approach will bring a brighter future to African-Americans. To most racists, paying a fine is better than associating with those they feel are inferior. The fine does not symbolize a punishment, but a legal alternative to obtaining their ultimate goal: segregation. Therefore, it is imperative that employment discrimination laws remain, even if they remain only as a symbol that our society will not endorse discrimination.[156]

Scholars should be fighting not for the repeal of anti-discrimination laws, but for their revision. If today's anti-discrimination laws are not working to their fullest, then it is time to appeal to the political process for moral leadership. If current representatives are not adequately addressing the problem, then it is time to elect new representatives who are concerned with racial discrimination in employment. Removing the anti-discrimination provisions of Title VII is not the answer. The abundance of Title VII suits illustrates that employment discrimination is still prevalent. Justice Marshall was right: the battle for racial equality has not yet been won,[157] and until employment discrimination suits are virtually extinct, laws preventing such discrimination should remain.

---

156 *See* Chemerinsky, *supra* note 84, at 361-62 (commenting that "[w]e live in a society already terribly divided over basis characteristics like race and religion. I can't imagine any government action that would more tear at the social fabric and divide a society than repealing them. Even if the employment discrimination laws are nothing but a symbol, their symbol is one society must continue to have").

157 *See supra* note 1 and accompanying text.